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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JESSE L. NIPPER, *et al.*,
Petitioners,

v.

JIM SMITH, SECRETARY OF STATE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITIONERS

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REPLY BRIEF IN SUPPORT OF PETITIONERS

The petitioners submit this brief in reply to certain points made in the respondents' opposition. As noted in the petition, in the United States' *amicus* brief, and in this reply, certiorari is appropriate in this case for several reasons, including the conflict between the Eleventh Circuit's decision and this Court's holding in *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991), the need to resolve various issues left open by *Houston Lawyers' Ass'n*, and the Eleventh Circuit's erroneous extension of this Court's decision in *Holder v. Hall*, 114 S. Ct. 2581 (1994).

I. THE CONFLICT WITH *HOUSTON LAWYERS' ASS'N* WARRANTS REVIEW OF THE ELEVENTH CIRCUIT'S DECISION.

Respondents contend that the Eleventh Circuit's decision complies with *Houston Lawyers' Ass'n* because the court of appeals conducted a "fact-intensive, intensely

localized analysis" which weighed the plaintiffs' proof of vote dilution against Florida's interest in maintaining a "partial Missouri plan" for selecting judges. Br. at 8. This argument mischaracterizes the Eleventh Circuit's decision as well as Florida's judicial election system.

All six judges of the en banc majority concluded that there could be no Section 2 violation in this case because any remedy would depart from the State's "judicial model." App. at 70a-82a; 103a-112a; 113a. Under the inquiry set forth in Parts III(A) and III(B)(1) of Chief Judge Tjoflat's opinion, in which all the members of the Eleventh Circuit majority joined, the availability of a remedy that comports with the State's "judicial model" is a *threshold* issue which determines whether plaintiffs have satisfied the first *Gingles* precondition,[1] and the Section 2 inquiry is at an end if the court concludes that any possible remedy would depart from the State's "model." App. at 76a-82a. According to this analysis, there is no need to weigh vote dilution, regardless of its severity, against the State's interest, because the State's "model" precludes any remedy.

Although Chief Judge Tjoflat's opinion for two judges concluded that plaintiffs in this case had proved vote dilution, he did not weigh this vote dilution against the State's interest as part of the totality of circumstances, but expressly held that the State's interest "has *minimal relevance* in the totality of the circumstances analysis in this case". App. 103a (emphasis added). Chief Judge Tjoflat went on to say that any remedy which disturbed Florida's current system would "undermin[e] the administration of justice" in Florida and was therefore unacceptable. App. at 112a. In light of that conclusion, even the most severe case of vote dilution would be insufficient to establish a Section 2 violation under Chief Judge Tjoflat's analysis. Indeed, despite finding that plaintiffs had proved actual racial bias in the voting community, Chief Judge Tjoflat's opinion never mentioned

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[1] *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

this evidence of vote dilution in conjunction with his discussion of the State's interests. App. at 103a-112a. Judge Edmondson's opinion for the other members of the Eleventh Circuit also did not weigh the evidence of vote dilution, but instead declined even to reach the issue of whether plaintiffs had proven vote dilution.[2] App. 113a.

The Eleventh Circuit's "judicial model" theory would preclude plaintiffs in any state or locality from successfully challenging at-large trial court elections under Section 2. Indeed, the Court never defines what it deems the irreducible components of Florida's "judicial model," but simply rejects, in *ad hoc* fashion, any potential remedial alternatives that would require a change in any feature of the current system. If the Eleventh Circuit is correct that all potential remedies would depart from the State's "judicial model" in Florida, they would depart from such a model in all of the states that utilize at-large trial court elections. While the respondents and Chief Judge Tjoflat mention Florida's non-partisan elections and system of appointment to mid-term vacancies, nothing in any Section 2 remedy would alter those features; elec-

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[2] Respondents quibble with characterizing the racially polarized voting in this case as "severe." Br. at 2. But the undisputed statistics are reprinted in the district court's opinion, App. at 53c-54c, and show that black voters gave from 73% to 98% of their vote to black judicial candidates while white voters gave from 67% to 97% of their vote to the white candidates in these same elections. All of the black candidates in these elections, without exception, were defeated by this white bloc voting, regardless of their qualifications, length of experience, endorsements, bar polls, or any other factor. App. at 25b (panel opinion). Chief Judge Tjoflat's conclusion that the voting community in the Fourth Judicial Circuit is driven by racial bias also reflects the severity of the vote dilution present here. Indeed, *all* of the Eleventh Circuit judges to address the issue found that the district court had committed legal error in finding no legally significant white bloc voting. App. at 99a-102a (opinion of Tjoflat, C.J., joined by Anderson, J.; App. at 14b-21b (panel opinion joined by Hatchett and Kravitch, JJ). Yet the Eleventh Circuit holds that this evidence need not even be weighed in determining petitioners' Section 2 claim.

tions would still be non-partisan and appointments could be used for mid-term vacancies under any potential remedial scheme. The potential remedial alterations that allegedly would depart from Florida's "judicial model"—such as using smaller election districts or reducing the use of numbered posts—would be just as much of a departure in other states as in Florida. Thus, the Eleventh Circuit's theory, if correct, would *always* result in the conclusion that at-large judicial elections are immune from a successful challenge under Section 2.

Indeed, by arguing that *Houston Lawyers' Ass'n* requires a "fact-intensive, intensely localized analysis" of the state's asserted interests (Br. at 8), respondents only underscore why the Eleventh Circuit's ruling must be reversed. The district court in this case never undertook the inquiry which the Eleventh Circuit deemed dispositive, and a "fact-intensive" analysis cannot properly be conducted in the first instance by an en banc appellate court. The Eleventh Circuit's decision rests on the conclusion that *all* possible remedies are barred because they would alter the state's "judicial model" and "undermine the administration of justice" in Florida. App. at 77a, 112a. As Chief Judge Tjoflat's opinion itself observes, the district court "did not undertake this inquiry", because the district court "did not equate the first *Gingles* factor with the feasibility of a remedy (as we do in this opinion)". App. at 103a.

Respondents assert that "the issue of a state's interest in its judiciary is a legal one for the court to resolve." Br. at 10. This assertion misses the mark for two reasons. First, *Houston Lawyers' Ass'n* did not expressly determine whether the strength of a state's interest in its election system is an issue of law or an issue of fact, and that question is an open one on which this Court's guidance is clearly needed. The discussion in *Houston Lawyers' Ass'n*, however, makes it clear that if state interests are relevant in determining liability under Section 2, they are merely one factor to be considered under the totality of circumstances inquiry. *Houston Lawyers'*

Ass'n, 501 U.S. at 427. Under *Gingles*, the subsidiary factors that go into making the totality determination are addressed as issues of fact, not of law. 478 U.S. at 78-79. Thus, the structure of the totality inquiry under *Gingles* strongly implies that the state's interests, to the extent relevant at the liability stage, must likewise be determined as an issue of fact, and must then be treated as only *one* factor to be weighed in determining the Section 2 claim.

Second, even if a state's interest in its current at-large system were an issue of law, the court's inquiry still cannot properly be guided by speculation. A proper inquiry depends upon a detailed examination of the actual features of the state's current system and of the possible alternative remedies that could be employed to overcome the vote dilution caused by the at-large system. Such an inquiry must be guided by *evidence* concerning the strength of the asserted state interests, the extent to which the state consistently adheres to those interests, and the precise manner in which each potential remedy would affect those interests. Accordingly, factual development of these issues in the district court is indispensable regardless of whether the ultimate conclusion is deemed legal or factual in nature.

Even with respect to subdistricts—the *only* potential remedy addressed by the district court—the district court's findings do not support the Eleventh Circuit's conclusions. The district court never held that the use of subdistricts would undermine the administration of justice in Florida or even that "linkage" was a compelling state interest. The district court merely stated that the State had a "legitimate" interest in maintaining at-large elections for judges. App. at 46c. Moreover, the only way in which the "linkage" interest would be compromised by subdistricts, according to the district court, was that judges would hear some cases in which one litigant was a constituent and the other was not. App. at 45c. The undisputed evidence showed that the same is frequently

true under the current at-large system, and that judges have been able to act impartially in those circumstances. Tr. Vol. 3 at 198-99; Vol. 5 at 7; App. at 137a (dissenting opinion of Hatchett, J.). Furthermore, the district court expressly *refused* to consider possible remedies that would preserve the state's "linkage" interest:

> Plaintiffs contend that a remedial approach other than subdistricting, such as cumulative voting, would satisfy the state's interests in linking jurisdiction with elective base while promoting greater opportunities for black voters. *The Court has no occasion to consider this contention, since proposed remedies are relevant only if a violation is proved.*

App. at 46c (emphasis added). The district court, in fact, precluded the plaintiffs from presenting evidence of remedial alternatives other than subdistricts. Tr. Vol. 5 at 81.

Thus, the Eleventh Circuit's speculation about how various remedies would allegedly infringe the State's interests is simply unsupported by factual development and fact-finding in the district court. Indeed, Chief Judge Tjoflat's opinion gave deference to "interests" which the State itself had never identified or advanced below, such as maintaining jury assignment rules that would allegedly be affected if the State created new judicial circuits. App. at 108a-109a.

By contrast, Chief Judge Tjoflat's discussion of state interests (Part V of opinion) gave no consideration to *undisputed* evidence of Florida's compelling state interest in overcoming discrimination in judicial elections. As a Florida commission concluded in official reports issued in 1990 and 1991, the underrepresentation of minorities on the bench in Florida is a serious problem which undermines the proper administration of justice in the state court system:

> [T]he underrepresentation of minorities as attorneys and judges serves to perpetuate a system which is,

> through institutional policies or individual practices, unfair and insensitive to individuals of color in the ways described in the Commission's first report . . . . [B]y threatening withdrawal of the tacit 'consent of the governed,' the underrepresentation of minorities in positions of responsibility in the judicial system weakens the very system of ordered liberty upon which our democracy is based.

1991 Report of Florida Supreme Court Racial and Ethnic Bias Study Commission, Pl. Ex. 15 (quoted in panel opinion, App. at 8b); *see also* Pl. Ex. 7 (1990 report). To disregard this officially recognized state interest, while giving dispositive weight to alleged interests supported by no evidence at all, does not remotely comply with *Gingles*' requirement of a "searching practical evaluation of the 'past and present reality,' " 478 U.S. at 79.

As pointed out in the Petition, the Eleventh Circuit's discussion of state interests omits any discussion of other crucial items of evidence as well. The court never mentions Florida's current assignment rules which permit elected judges to sit outside of the area from which they were elected, thus breaking the "linkage" which is alleged to be a crucial state interest. Fla. Stat. § 26.57. The court also never mentions plaintiffs' evidence showing how subdistrict election systems for trial judges are actually working in other states. *See* Petition at 18-19. The court also gave no consideration to some of the available remedies for vote dilution, including the use of subdistrict elections combined with at-large retention elections, which would satisfy any "linkage" interest while requiring only the most modest changes to the state's current system. In sum, the Eleventh Circuit, unassisted by pertinent findings in the district court, simply failed to conduct any meaningful scrutiny of Florida's asserted state interests.

Respondents' brief also mischaracterizes Florida's trial judge election system by calling it a partial "Missouri plan", and claiming that various potential remedies would

interfere with Florida's alleged policy of removing judges from "electoral politics". Br. at 6 (quoting Eleventh Circuit opinion, App. at 13a). Chief Judge Tjoflat's opinion makes the same mistake. App. at 13a, 74a. Florida employs the "Missouri plan" of judicial selection *only* for its Supreme Court justices and District Court of Appeal judges. In conformance with the Missouri plan, *those* judges are selected through appointment only, and are subject to periodic uncontested retention elections, in which voters either approve or disapprove the judge's retention.[3] The present case, however, involves trial judges. The Florida Constitution provides for election of trial judges: "Circuit judges and judges of county courts shall be elected by vote of the qualified electors". Fla. Const. art. V, § 10. Only when a mid-term vacancy arises does the Governor have the authority to make an appointment to a circuit or county court, and then only to a term ending in January of the year following the next primary or general election, when an election must again be held to fill the seat. Fla. Const. art. V, § 11(b). Regular elections are held every two years, meaning that terms filled by appointments to vacancies are generally very short.[4] Thus, even if a portion of the sitting judges initially obtained their seats by appointment to mid-term

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[3] Madison B. McClellan, Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla. L. Rev. 529, 530, 537 (1991); Fla. Const. art. V, § 10.

[4] Indeed, even when a mid-term vacancy arises on a trial court, Florida case law establishes that a special election rather than gubernatorial appointment should be used to fill the vacancy when the vacancy occurs sufficiently close to a regularly scheduled election to permit the seat to be filled at that election. *Judicial Nominating Commission, Ninth Judicial Circuit v. Graham*, 424 So.2d 10, 11-12 (Fla. 1982). As the Florida Supreme Court stated in that case, "the constitutional provision [concerning vacancies] was intended to have the election process select members of the judiciary if the electorate had adequate knowledge that a vacancy would occur." *Id.* at 11-12.

vacancies, Florida's Constitution makes all trial judges subject to election at the end of their terms, and the state's express policy is to maintain popular election of trial judges.[5] As the Florida Supreme Court noted in another case, "the citizens of Florida have chosen to retain the power to elect county and circuit judges." *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1335 (Fla. 1990). This choice having been made by the citizens, the State cannot rely upon theories of "judicial independence" to shield its judicial election system from the anti-discrimination requirements of the Voting Rights Act. *Chisom v. Roemer*, 501 U.S. 380, 400-01 (1991).

II. THE ELEVENTH CIRCUIT'S ERRONEOUS INTERPRETATION OF *HOLDER v. HALL* WARRANTS THIS COURT'S REVIEW.

Respondents make no serious effort to defend the Eleventh Circuit's interpretation of *Holder v. Hall*, 114 S.Ct. 2581 (1994), to bar plaintiffs' Section 2 claim. Instead, they contend that this interpretation is not the holding of the Eleventh Circuit, but only of two judges. Br. at 14. That argument is flatly incorrect. All six judges of the *en banc* majority joined the portion of Chief Judge Tjoflat's opinion which read *Holder v. Hall* to impose special requirements in Section 2 judicial election cases (Parts III(A) and III(B)(1)). According to that portion of the opinion, plaintiffs in judicial election cases are required to prove that, "within the state's judicial model, there exists an alternative election scheme that could serve as an appropriate section 2 remedy." App. at 78a.

The court of appeals believed this conclusion to flow from the plurality observation in *Holder v. Hall* that "where there is no objective and workable standard for

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[5] In any event, the route of appointment has not served as a substitute for a more open election system, inasmuch as only one of the 28 circuit judges and one of the 12 county judges was black at the time this case was filed. App. at 6b (panel opinion).

choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dillutive under § 2." App. at 81a-82a, quoting *Holder*, 114 S.Ct. at 2586 (plurality opinion). Of course, this reading of *Holder* is incorrect, because *Holder* recognizes that no "benchmark" problem is presented in challenges to multimember at-large election systems, where no challenge is being made to the size of the elected body. 114 S. Ct. at 2589-90 (O'Connor, J., concurring in part and concurring in the judgment). The Eleventh Circuit's unwarranted expansion of *Holder* to bar, as a matter of law, any remedy that departs from the state's "judicial model", sets a dangerous and confusing precedent that warrants reversal by this Court.

CONCLUSION

For the reasons stated in our petition, as well as in this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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